

## **803 KAR 1:075. Exclusions from minimum wage and overtime.**

RELATES TO: KRS 337.275, 337.285

STATUTORY AUTHORITY: KRS 337.295

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.010 excludes certain types of employees from being subject to the minimum wage and overtime provisions of the act and KRS 337.285 excludes certain employees from its coverage. The function of this administrative regulation is to define these exclusions. These definitions will guide the office in carrying out its responsibilities under the law and assist employers who may be concerned with the provisions of the law in understanding their obligations under the law.

Section 1. Definitions. (1) The term "retail store or service industry" shall mean an establishment seventy-five (75) percent of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

(2) The term "hotel" means an establishment known to the public as a hotel, which is primarily engaged in providing lodging or lodging and meals for the general public. Included are hotels operated by membership organizations and open to the general public and apartment hotels which provide accommodations for transients. However, an establishment whose income is primarily from providing a permanent place of residence or from providing residential facilities complete with bedrooms and kitchen for prolonged periods would not be considered a hotel.

(3) The term "motel" means an establishment which provides services similar to that of a hotel described in subsection (2) of this section, but which caters mostly to the motoring public, providing it with motor car parking facilities either adjacent to the room or cabin rented or at some other easily accessible place. Included in the term "motel" are those establishments known to the public as motor hotels, motor lodges, motor courts, motor inns, tourist courts, and tourist lodges.

(4) The term "restaurant" means an establishment which is primarily engaged in selling and serving to purchasers at retail prepared food and beverages for consumption. This includes such establishments commonly known as lunch counters, refreshment stands, cafes, cafeterias, coffee shops, diners, dining rooms, lunch rooms, or tea rooms. The term "restaurant" does not include drinking establishments, such as bars or cocktail lounges, whose sale of alcoholic beverages exceed the receipts from sales of prepared foods and nonalcoholic beverages or establishments offering meal service on a boarding or term basis or providing such service only as an incident to the operation of a business of another kind and primarily to meet institutional needs for continuing meal service to persons whose continued presence is required for such operation, such as a boarding house, dining facilities of a boarding school, college or university which serves its students and faculty, lunchroom facilities for private and public day school students, and other institutional food service facilities providing long-term meal service to stable groups of individuals as an incident to institutional operations in a manner wholly dissimilar to the typical transactions between a restaurant and its customers.

(5) "Excise taxes" are taxes levied on the manufacture, sale or consumption of a commodity, and taxes levied on license to pursue certain occupations and corporate privileges.

Section 2. Hotel or Motel. The primary function of a hotel or motel, is to provide lodging facilities to the public. In addition, most hotels or motels provide food for their guests and many sell alcoholic beverages. These establishments also may engage in some minor revenue producing activities; such as, the operation of valet services offering cleaning and laundering service for the garments of their guests, news stands, hobby shops, renting out of their public rooms for meetings, lectures, dances, trade exhibits and weddings. The exemption provided for hotels and motels in KRS 337.010(2)(a)(vi) and KRS 337.285 will not be defeated simply because a hotel or a motel

engages in all or some of these activities, if it is primarily engaged in providing lodging facilities, food and drink to the public.

Section 3. Exemptions from Minimum Wage and Overtime. (1) Employees of retail stores, service industries, hotels, motels, and restaurant operations whose average annual gross volume of sales made for business done is less than \$95,000 for the five (5) preceding years exclusive of excise taxes at the retail level are exempt from both the minimum wage and overtime provisions of the act.

(2) To qualify for this exemption, the establishment must be recognized as retail in the particular industry. Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process.

(3)(a) To compute the average annual gross volume of sales made for business done, it will be necessary for the business to add all the sales made for business done for the five (5) preceding years, exclusive of excise taxes at the retail level, and divide by five (5). If this average is less than \$95,000, the establishment would be exempt.

(b) If the establishment has been in business for less than five (5) years, the gross sales will be totaled for the years the establishment has been in business and divided by the number of years. If this average is less than \$95,000, the establishment would be exempt.

(c) If the establishment has been in business for less than one (1) year, the gross sales will be totaled for the number of months the establishment has been in business and divided by the number of months. This amount will then be multiplied by twelve (12). If this amount is less than \$95,000, the establishment would be exempt.

(d) Excise taxes at the retail level are not computed in totaling the gross volume of sales. Excise taxes which are levied at the manufacturer's, wholesaler's or other distributive level will not be excluded in calculating the dollar volume of sales.

Section 4. Exemptions from Overtime. (1) Employees of retail stores whose principal duties are connected with the selling, purchasing, and distributing of goods and employees of a restaurant, hotel and motel operation; any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; any salesman, parts man, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily in the business of selling trailers, boats, or aircraft to ultimate purchasers; and any driver employed by an employer engaged in the business of operating taxi cabs or to employees whose function is to provide twenty-four (24) hour residential care on the employer's premises in a parental role to children who are primarily dependent, neglected and abused and who are in the care of private nonprofit child caring facilities licensed by the Cabinet for Health and Family Services under KRS Chapter 199, are exempt from the overtime provisions of KRS 337.285.

(2) Employees of a retail store whose principal duties are not connected with the selling, purchasing, and distributing of the goods will not be considered as exempt employees, nor will employees of a service establishment which does not sell goods, but is in the business of selling a service. (LAB-11; 1 Ky.R. 256; eff. 1-8-75; Am. 2 Ky.R. 600; 3 Ky.R. 301; eff. 8-4-76; 9 Ky.R. 42; eff. 8-11-82; TAm eff. 8-9-2007.)